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In the Supreme Court of the United States

CITY OF CINCINNATI,
MILTON R. DOHONEY, JR., AND JOEL KOOPMAN,
Petitioners,

v.

MARK MILLER, COALITION OPPOSED
TO ADDITIONAL SPENDING & TAXES,
AND WEDEMANDAVOTE.COM,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The facts of this case present an important and unresolved First Amendment issue. The speech that is the subject of this case is not the private speech of a private party. Third parties do not have unilateral access to the interior spaces of City Hall for speech that is their own private speech. In *Arkansas Educ. Television v. Forbes*,[1] *Cornelius v. NAACP*,[2] and *Perry Education Association v. P.L.E.A.*,[3] as well as in the circuit court cases *Del Gallo v. Parent*[4] and *ACLU v. Mote*,[5] the speakers that sought access to the fora were competing with other speakers in order to express private speech. Cincinnati does not allow the use of City Hall for private speech. All speech, whether in collaboration with a third party or otherwise, must be related to and in furtherance of the work of City officials, individually or collectively. The Sixth Circuit ignored this critical distinction, summarily rejected the characterization of the collaborative speech as "government speech" and applied forum analysis principals that are inconsistent with the nature of the forum. The forum analysis principles applied by the Sixth Circuit in this case are only appropriate when the speech that is under scrutiny is the private speech of private individuals or organizations. The speech at

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[1] 523 U.S. 666 (1998).

[2] 473 U.S. 788 (1985).

[3] 460 U.S. 37 (1983).

[4] 557 F.3d 58 (1st Cir. 2009).

[5] 423 F.3d 438 (4th Cir. 2005).

issue in this case is not private speech but is the product of collaboration between City officials and private individuals. It is for these reasons that this Court should grant certiorari.

STATEMENT OF THE CASE

Despite Respondents' repeated mischaracterization of the nature of the speech at issue in this case, the stipulated record demonstrates that all use of the spaces within City Hall were arranged or requested by City officials.[6] In order to access the interior spaces of City Hall for speech purposes private speakers must collaborate with a City official and communicate a message that is consistent with the message of that City official. Accordingly, Administrative Regulation No. 5 does not open this nonpublic forum to private use. Instead, it serves to provide City officials with a proper use of their workplace and does not deprive them of their own access simply because they are collaborating with private parties. Because City officials may only use the interior of City Hall for purposes consistent with their rights and responsibilities under the Charter and such uses are necessarily consistent with the purpose of the City Hall forum, the uses involving collaboration with third parties are reasonable in light of the purpose of the forum.

Respondents focus on two particular uses among the thousands of uses of the interior of City Hall set

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[6] Joint Stipulations of Fact, App. D of the City's Petition, at para. 7.

forth in the calendars since 1997.[7] These two uses are the press conference held by Councilmember Cranley in support of the school tax levy[8] and the Citizens for Community Values ("CCV") press conference held by Councilmember Monzel in which CCV called upon an alternative newspaper to stop accepting adult advertisements.[9] In describing these events, Respondents notably omit the participation of City officials. For example, with respect to the school tax levy press conference: (1) a resolution in support of the school tax levy was on the City Council agenda for the City Council meeting that was to occur immediately following the press conference,[10] and (2) members of City Council, led by Vice-Mayor Crowley and Councilmember Cranley, pledged their support for the levy at the press conference.[11] The participation of City officials, in collaboration with private parties, was within the scope of the legislative duties of the aforementioned City officials. With respect to the CCV press conference arranged by Councilmember Monzel, Councilmember Monzel was a signatory to the letter presented at the press conference which called upon an alternative weekly newspaper to stop accepting adult advertisements.[12] Councilmember Monzel's conduct

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[7] *Id.* at para. 6.

[8] *Id.* at para. 7(a).

[9] *Id.* at para. 46-47.

[10] *Id.* at para. 40.

[11] *Id.* at para. 7(a), exhibit F4.

[12] *Id.* at para. 46, 48.

was within the scope of his responsibilities to the City, consistent with his oath of office. Thus, a complete presentation of the facts surrounding these events illustrates that each event was within the proper scope of the officials' public duties.

Such facts are important, indeed critical to the analysis. But the district court and the Sixth Circuit failed to carefully and thoroughly examine the uses at issue, the speech of the participating private individuals, the connection between the use and the work of the collaborating official and the manner in which the use was consistent with the relevant official's rights and responsibilities under the City Charter. The stipulated record and the administrative regulation are clear: in order for a private individual to participate in a use of the interior of City Hall, there must be an overlap between the participation of the collaborating private individual, the communicative message espoused by the collaborating City official, and the purpose of the City hall workplace. While Respondents repeatedly attempt to recast the City's policy as one that allows private use of the interior of City Hall, such a characterization is unequivocally false and unsupported by the stipulated record. Private individuals are not permitted access to City Hall in order to use the interior spaces for a birthday party or a chess tournament. Private individuals, in collaboration with a City official, may come into City Hall and participate in a meeting, a press conference, or other use that is in furtherance of the work of the pertinent City official.

The Sixth Circuit's determination that the City's Administrative Regulation No. 5 is not reasonably related to the purpose of the forum conflicts with the analyses of the First and Fourth Circuits in *Del Gallo* and *ACLU*

Respondents concede that forum analysis "involves fact-specific concerns[,]"[13] but then proceed to disregard the critical distinction between the nature of the post office sidewalk nonpublic forum, in *Del Gallo v. Parent*,[14] and the City Hall nonpublic forum. While the *Del Gallo* court identified avoiding the appearance of political partisanship as a legitimate objective reason for excluding access, this must be contextualized given the particularized "purpose of the forum."

Individualizing the outcome to the particular character of the forum necessarily leads to a different conclusion with respect to City Hall because the nature of a workplace housing, among others, elected officials, contains multiple potential instances of partisanship. In order to avoid silencing the specific viewpoints of the City's elected officials, City Hall is necessarily political and partisan – the particular political persuasion or viewpoint depends only upon the individual City official's viewpoints and, as long as the use of City Hall is within the scope of the official's public duties, these viewpoints are not otherwise limited by the Administrative Regulation. Given the

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[13] Respondents' Brief in Opposition to Petition for Writ of Certiorari ("Respondents' Brief"), p. 18.

[14] 557 F.3d 58 (1st Cir. 2009).

important differences that exist between the various types of nonpublic fora, a court must consider the specific character of the nonpublic forum when it evaluates the reasonableness of a regulation limiting access. Notwithstanding the Sixth Circuit's failure to do so in this case, an evaluation of the City Hall nonpublic forum reinforces the lawfulness of the City's regulation of the interior of City Hall.

After concluding that the post office sidewalk was a nonpublic forum, the *Del Gallo* court held:

> The reasonableness of a regulation is weighed "in light of the purposes served by the forum." "The purpose of the forum in this case is to accomplish the most efficient and effective postal delivery system," by providing access to post office customers. *The Postal Service's stated rationale* for disallowing election campaigning on its sidewalks is "to prevent abuses and to preclude any appearance of partisan endorsement or preference."[15]

Thus, the Court analyzed the purpose of the forum with reference to both its stated purpose and to the evidence presented regarding the history of its past uses. By contrast, the Sixth Circuit undertook no such inquiry and summarily dismissed the City's stated purpose of the City Hall nonpublic forum – to allow City officials to exercise their rights and responsibilities under the Charter.

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[15] *Del Gallo*, 557 F.3d at 73 (internal citations omitted) (emphasis added).

In *Del Gallo*, the First Circuit further cautioned that the reasonableness of the regulation must be analyzed in light of the effect on all such affected premises, in that case post offices across the country. It further indicated that the reasonableness of the restriction was enhanced by the availability of alternative public fora for expression in close proximity.[16] Neither of these two reasonableness factors was considered by the Sixth Circuit. The Sixth Circuit disregarded the availability of an alternate forum for expression just steps away, on the exterior front portion of City Hall and on the adjacent public sidewalks,[17] and ignored the effect of its decision on other government workplaces throughout the Sixth Circuit. Accordingly, the Sixth Circuit's decision stands in marked contrast to that of the First Circuit in *Del Gallo* and should be reviewed by this Court.

In an attempt to characterize *ACLU v. Mote*[18] as supportive of its position, Respondents claim they are an "entit[y] of a 'similar character' to those allowed access[,]" to the areas within City Hall. Respondents have repeatedly attempted to recast themselves as "similarly situated" to other third parties who have collaborated with City officials to participate in uses within City Hall. Such a characterization is disingenuous at best. Respondents *refused* to collaborate with City officials or seek a City sponsor. Similarly, *ACLU's* Lyndon Larouche supporters

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[16] *Id.* at 74-75.

[17] Joint Stipulations of Fact, App. D of the City's Petition, at para. 33.

[18] 423 F.3d 438 (4th Cir. 2005).

refused to obtain a student sponsor. By application of Respondents' reasoning, in order to prevail in *ACLU*, the Lyndon Larouche supporters needed only to identify a non-student who was provided access to the campus by virtue of being sponsored by a student in order to create parity with that sponsored student. Such reasoning ignores the core holding of *ACLU*.

In finding the limitation both viewpoint neutral and reasonable in light of the purpose of the forum, the Fourth Circuit held: "If outsiders desire to leaflet or give a speech in another area of campus, they must simply find a sponsor, and they can perform these activities anywhere on the campus."[19] In contrast, the Sixth Circuit stated that "the plaintiffs' claims are directed at the sponsorship requirement itself and do not allege that officials, in practice, exercise their discretion to grant sponsorship in a discriminatory manner . . . ." Thus, according to the Sixth Circuit, the mere existence in the City's Administrative Regulation of sponsorship as a prerequisite to access constituted an injury in fact. This, notwithstanding that the City also requires that any use of the interior of City Hall is consistent with the relevant City official's public duties. *ACLU* had no similar requirement for the sponsoring students and yet the sponsorship requirement was deemed reasonable by the Fourth Circuit. In order to resolve the inconsistent application of these forum analysis principals, the City respectfully requests review by this Court.

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[19] *Id.* (citations omitted).

Speech arranged by and for government officials for public purposes within the scope of their official responsibilities is government speech even though third parties participate.

Though Respondents claim that the Circuits are uniformly applying *Pleasant Grove City, Utah v. Summum*,[20] this assertion is based upon a misapprehension of the analysis and holding in the Sixth Circuit case *ACLU of Tennessee v. Bredesen*.[21] Far from identifying a uniform application of the Fourth Circuit's four-factor test, discussed *infra*, Respondents have instead highlighted another circuit split. While some circuits have indeed adopted and applied the Fourth Circuit's four-factor test, the Sixth Circuit has expressly rejected this test. In *Bredesen*,[22] the Sixth Circuit held that a Tennessee statute authorizing a specialty license plate with a "Choose Life" message did not violate the First Amendment despite the fact that the legislature refused to similarly make available license plates with a "Pro-Choice" message.[23] In so doing, the Sixth Circuit recognized that the Fourth Circuit, in *Planned Parenthood of S.C., Inc., v. Rose*,[24] had invalidated a nearly identical specialty license plate law in South Carolina using the four-factor test. The Sixth Circuit

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[20] 555 U.S. 460 (2009).

[21] 441 F.3d 370 (6th Cir. 2006).

[22] 441 F.3d 370, 376 (6th Cir. 2006).

[23] *Id.* at 372.

[24] 361 F.3d 786 (4th Cir. 2004).

explicitly rejected the four-factor test relied upon by the Fourth Circuit in *Rose*. However, the four-factor test has since been adopted by the Eighth and Ninth Circuits.[25] In analyzing the City's claim in the case at bar that the relevant speech was government speech, the Sixth Circuit employed no discernible analysis. Instead the Sixth Circuit summarily concluded that the government speech doctrine did not apply. It is clear that the circuits are split on the appropriate analysis by which to determine whether speech is properly characterized as government speech.

With the exception of *Johanns v. Livestock Mktg. Ass'n.*,[26] every government speech case cited by Respondents analyzes speech in the context of specialty license plates. The character and nature of the interior of City Hall is dramatically different from that of a license plate. City Hall is a workplace used by City officials to conduct the business of the City. The spaces within City Hall are limited and consequently the use of those spaces is similarly limited. License plates are not similarly limited – a government may provide seemingly endless message options for specialty license plates. Such products are not constrained by the logistical concerns of the use of spaces within City Hall. In *Illinois Dunesland Preservation Society v. Illinois Department of Natural Resources*,[27] the Seventh Circuit held that the materials chosen for a display rack in a public park

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[25] See *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009); *Ariz. Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008).

[26] 544 U.S. 550 (2005).

[27] 584 F.3d 719 (7th Cir. 2009).

constituted government speech because the materials were designed to attract visitors to the park and promote tourism in Illinois. The Illinois Dunesland Preservation Society claimed that the failure to include its pamphlets was in violation of the First Amendment. The Seventh Circuit held that including the group's offending pamphlets could give them legitimacy, undermining the government's intended pro-tourism message.[28] The Court similarly found compelling the limited space of the display itself. The Court noted that if the park were required to display every privately endorsed pamphlet from an unlimited number of organizations, the requirement would lead inevitably to the elimination of all such display racks on public property.[29]

The City is confronted with a similar logistical problem. Because City Hall's primary purpose is as a workplace for City officials, forcing the City to open the forum to private parties for their own private use would overwhelm legitimate uses by City officials and, accordingly, the business of the City would be impeded. In order to avoid this result the City would instead be forced to close the forum to all speakers. "And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place."[30]

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[28] *Id.* at 725.

[29] *Id.*

[30] *Summum*, 555 U.S. at __, 129 S. Ct. at 1138.

Finally, while several circuits have adopted the *Rose*[31] four-factor test, debate continues regarding the measure of control the government must exert over a third party's message in order to properly characterize the speech at issue as government speech. In *Sutliffe v. Epping*,[32] a local government created a website with the intended purpose of conveying information about the town and its citizens to potential visitors. In the course of so doing, the town chose to add a limited number of hyperlinks on its website to some external organizations, to the exclusion of others. Holding that the website and the town's selection of included hyperlinks constituted government speech, the court held: "when the government uses its discretion to select between the speech of third parties for presentation through communication channels owned by the government and used for government speech, this in itself may constitute an expressive act by the government that is independent of the message of the third-party speech."[33]

By contrast, in *International Women's Day March Planning Committee v. San Antonio Free Speech Coalition*,[34] the Fifth Circuit analyzed San Antonio's financial subsidization of a limited number of annual parades and considered whether or not the government's endorsement of "the general message of each event through its provision of financial support[,]"

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[31] 361 F.3d at 786.

[32] 584 F.3d 314 (1st Cir. 2009).

[33] *Id.* at 330.

[34] 619 F.3d 346 (5th Cir. 2010).

was sufficient to properly characterize those parades as government speech.[35] The Court held that the parade was not government speech, but instead constituted the private speech of the participants because the City did not exercise direct control over "the messages conveyed at its sponsored events[.]" In so deciding, the Court stated that for a procession to qualify as government speech the city would need to at least "make some bare showing of organizational or planning involvement."[36] *International Women's Day* conflicts with the *Sutliffe* court's holding that speech merely endorsed by the government, regardless of whether or not the government exerts any control of or involvement in developing the message, may properly be characterized as government speech.

Thus, contrary to the position advanced by Respondents regarding the uniformity of government speech analysis across the circuits, the analyses are far from settled. In the wake of *Summum,* there are residual as well as recent conflicts between the circuits. This Court should accept certiorari in order to clarify the appropriate analysis by which the circuits classify speech as government speech or private speech.

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[35] *Id.* at 360.

[36] *Id.*

Respectfully submitted,

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